BRIEF FOR THE APPELLANTS

IN THE

Supreme Court of the United States

October Term, 1964

No. 360

A. M. HARMAN, JR., ET AL., APPELLANTS,

v.

LARS FORSSENIUS, ET AL.

Appeal from the United States District Court
For the Eastern District of Virginia

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OPINION BELOW

The opinion of the District Court for the Eastern District of Virginia, Richmond Division, is not yet reported. A copy of this opinion is included in the Transcript of Record (R. 42-50).

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1253. The Final Order of the court below was entered on May 29, 1964 (R. 51). Notice of Appeal was filed by Appellants on June 11, 1964 (R. 52). This Court noted probable jurisdiction on October 12, 1964 (R. 114).

STATUTES INVOLVED

The statutes involved are Chapter 1 of the Acts of the General Assembly of Virginia, Extra Session, 1963 (the Special Acts) (R. 5-18) and Section 24-17.2 of the Code of Virginia of 1950 (Supp. 1964), added by Chapter 2 of the Special Acts, which were held unconstitutional by the court below. Such specified portions of the Special Acts (Chapter 1 and Section 24-17.2) are hereinafter designated as the Statutes Involved. Because of their length, the Statutes Involved are not set out here verbatim. Their text is set forth at R. 5-7, 9-10.

QUESTIONS PRESENTED

1. Did the court below err in holding that the Statutes Involved, which may require a voter in an election for federal officers to prove residence by filing a certificate of continuing residence in advance of the election, thereby create a "qualification" for electors of the Congress not demanded of electors of the House of Delegates, the most numerous branch of the Virginia legislature, and are thus repugnant to Article I, § 2 and the Seventeenth Amendment of the Constitution of the United States?

2. Did the court below err in issuing on the authority of Article I, § 2 and the Seventeenth Amendment of the Constitution of the United States a general injunction against requiring compliance by an elector with the Statutes Involved in elections for President and Vice-President of the United States?

3. Should the court below have stayed the proceedings in these cases pending an interpretation of the Special Acts by the courts of Virginia in conformity with the doctrine of abstention?

4. Should the court below have sustained (i) the motions to dismiss the complaints in both cases for failure to join indispensable parties, or (ii) the motion to dismiss in the *Henderson* case for the plaintiff's want of standing to sue?

STATEMENT OF THE CASE

Since the adoption of its Constitution of 1902, Virginia has required, as a qualification for voters and new registrants in all elections, payment in person in advance of elections of the state capitation or poll tax. See *Va. Const.* §§ 18, 20. The poll tax (used for educational purposes) is the only state-wide tax assessed annually against all state residents, and it is payable by such residents to the local revenue officials of the political subdivisions in which they reside. See *Va. Const.* §§ 173, 38.

At the same time payment of the poll tax became a voter qualification, permanent registration became an institution in Virginia. Once a voter has registered under the system that presently obtains, his name will ordinarily remain upon the registration rolls for life. Obviously, to prevent fraudulent voting by persons once registered who were no longer residents, a means of checking the continuing state and local residence qualifications of registered persons was necessary. The list of persons who, in their respective localities, had paid their state capitation taxes to qualify themselves to vote provided just such a means (R. 76-77).

When ratification of the Twenty-fourth Amendment to the Constitution of the United States, which absolutely prohibits the states from making payment of a poll tax a mandatory prerequisite for voting in certain enumerated federal elections, became imminent, it appeared that two fundamental changes in Virginia's election laws were necessary if such laws were to comply with both the Constitution of

the United States and the Constitution of Virginia. First, a dual system of registration and voting, with the poll tax in effect for state and local elections and inoperative for federal elections, had to be established to clarify the effect of the Twenty-fourth Amendment upon the existing system. Second, a new means of checking the residence qualifications of federal electors who chose not to pay their poll taxes had to be found.

The Governor accordingly convened an Extra Session of the Virginia General Assembly that proceeded to enact the Special Acts, which went into effect on February 19, 1964. On February 20, 1964, the Appellees instituted these suits, which were consolidated by an order of the court below entered on March 4, 1964 (R. 23).

These suits were instituted by the Appellees as class actions to have the Special Acts in their entirety declared unconstitutional, and to have the Appellants enjoined from enforcing any part of them. The Appellees are both registered voters, but their complaints reveal that while the Appellee Henderson paid his poll taxes in the manner prescribed by the Constitution of Virginia and the Special Acts (R. 20), and thus could not have been denied his vote in any election held in 1964, the Appellee Forssenius in 1964 neither paid his poll taxes nor filed the certificate of residence as provided in the Special Acts (R. 2). The Appellants are the members of the Virginia State Board of Elections, the Treasurer of Roanoke County, Virginia, and the Director of Finance in Fairfax County, Virginia.

The court below held unconstitutional only the Statutes Involved (as they required the filing of a certificate of residence), and generally enjoined the Appellants from enforcing them against any elector by a Final Order entered on May 29, 1964 (R. 51-52). Effectiveness of the Final Order was, however, suspended for thirty days so that the Appel-

lants might seek a further stay from this Court or a Justice thereof during the pendency of their appeal. An application for a Stay of Order was filed by the Appellants with Mr. Chief Justice Earl Warren on June 12, 1964, and was denied on June 24, 1964.

SUMMARY OF ARGUMENT

I. The Statutes Involved do not create a "qualification" for federal voters, not required of state voters, within the meaning of Article I, § 2 and the Seventeenth Amendment of the Federal Constitution. When these provisions speak of elector "qualifications," they mean the "qualifications" for voters established by the states in their constitutions. See *The Federalist*, No. 52, at 342 (Modern Library ed.) (Madison); *Ex parte Yarbrough*, 110 U. S. 651, 663 (1884). While there are no Virginia cases in point, authorities from other states (which the court below summarily disregarded) uniformly hold that a requirement for proof of an existing elector qualification appearing in the state constitution does not establish an additional "qualification" as a matter of state law. Annot., 14 A.L.R. 260 (1921).

The Statutes Involved do not purport to, nor do they in fact, do anything more than require that all voters prove their continuing satisfaction of the residence requirements of Section 18 of the Constitution of Virginia, by either one of two means: (i) filing a simple certificate of residence, or (ii) paying the poll tax (as required by the tax laws of Virginia regardless of whether it is a condition of voting) which, as the record reveals without any contradiction, has been the traditional means of proving voting residence since permanent voter registration was instituted in Virginia. Neither means of proof is compulsory upon any voter, state or federal; neither creates any burden upon the voter. There-

fore, since the Statutes Involved do nothing more than require proof of an indisputably valid existing qualification, they do not create an additional "qualification" for any elector as a matter of state law, and therefore as a matter of federal law as well.

Nor do the purely formal differences between the two means of proof suffice to make filing a certificate of residence a "qualification." In substance it is no different from its alternate. Payment of a poll tax, a tax assessed upon the person of the taxpayer, has always been regarded, in Virginia and elsewhere, as one of the strongest indicia of legal residence or domicile. See 1 Beale, *Conflict of Laws*, § 41C.6 (1935). In Virginia, because of the preliminary determinations as to legal residence implicit in assessment of the poll tax and substantiated by its voluntary payment, the essential facts proven by regular payment of a poll tax are exactly those required to be certified in the certificate of residence. Therefore, despite their formal differences, the means of proof provided for in the Statutes Involved are reasonably interchangeable in operative effect as methods of proof, and neither one could properly be held a "qualification." Thus, the court below erred in holding for the reasons appearing in its opinion that the Statutes Involved create an invalid "qualification."

II. Conceding *arguendo* that the certificate of residence requirement of the Statutes Involved creates a "qualification" for electors of the Congress within the meaning of Article I, § 2 and the Seventeenth Amendment, and that this "qualification" is not applied to electors of the Virginia House of Delegates, the Statutes Involved would indeed be invalid as applied to electors of the Congress. But they would be invalid only as so applied; there is nothing in the

Federal Constitution that requires the qualifications of electors of the President and Vice-President to be the same as those of any other elector. Therefore, the court below erred in extending its decree against enforcement of the Statutes Involved to elections for the President and Vice-President, since under the lower court's reasoning the Statutes would be perfectly constitutional in that context.

III. This Court has repeatedly held that the "abstention doctrine" should be applied whenever (i) an injunction against a state statute on federal constitutional grounds is sought, (ii) the statute is unclear and uninterpreted by the state courts, (iii) there is an expeditious state remedy, (iv) a possibility exists that the statute will be invalidated as a matter of state law and the federal constitutional issue thus avoided, and (v) action by the federal court would needlessly interfere with a valid and vital state concern.

In these cases, the Appellees sought on federal constitutional grounds to enjoin the enforcement of the Special Acts. They argued at length that the Special Acts were unclear in light of relevant state constitutional and statutory provisions. The Virginia courts never had a chance to construe the Statutes Involved. Concededly, they would be held to violate the Constitution of Virginia if it should be found that they create a voter qualification not found therein, and this would dispose of both cases. In enjoining their enforcement, the court below interfered with one of the most valid and vital state concerns imaginable—proper administration of elections—and it did so needlessly, since the Appellees might have had expeditious relief under the Virginia Declaratory Judgments Act. Therefore, since all the necessary elements for invocation of the abstention doctrine were present in these cases, the court below ought to have abstained.

In addition, the Constitution of the United States itself and the numerous authorities construing it indicate that the states have *exclusive* power to create qualifications for voting in all elections—federal, state and local. To be sure, once these qualifications are established, they become subject to the provisions of the Constitution. But the preliminary question of whether a particular enactment creates a qualification for voting under state law should surely be left to the state courts for determination.

IV. Since a decree granting the relief requested by the Appellees—an injunction against enforcement of all of the Special Acts—would have required inaction by parties not joined and not under the mandatory supervisory power of the Appellants, indispensable parties were not before the court below. And since the Appellee Henderson complied with all of the requirements of the Special Acts, he could not have been harmed or threatened with harm by them and therefore lacked standing to sue. The court below should therefore have dismissed both complaints on Appellants' motions.

ARGUMENT

I.

THE COURT BELOW ERRED IN HOLDING THAT THE CERTIFICATE OF RESIDENCE IS AN ADDITIONAL QUALIFICATION FOR VOTING.

A. Purpose and Effect of the Special Acts.

The Special Acts were passed by an Extra Session of the General Assembly of Virginia held in November, 1963, after it had become apparent that the Twenty-fourth Amendment to the Constitution of the United States would be ratified early in 1964, a year of presidential, congressional and municipal elections in Virginia. As has been in-

dicated, the Constitution of Virginia has long contained provisions making the payment of capitation or poll taxes a prerequisite for registration and voting in all elections. *Va. Const.* § § 18, 20. To amend these provisions requires affirmative action by two sessions of the General Assembly and a vote by the people. *Va. Const.* § § 196-197. Thus, there was insufficient time to accomplish any amendment prior to the municipal elections to be held in June, 1964, and the congressional primary elections to be held in July, 1964.

The Twenty-fourth Amendment to the Constitution of the United States, of course, automatically rendered inoperative the poll tax requirements of the Constitution of Virginia as they applied to the specified federal elections. But it was equally clear from the language of the Twenty-fourth Amendment and the legislative history of Senate Joint Resolution 29, 87th Congress (2d Sess. 1962), proposing the Amendment, that it was not intended to prohibit the payment of poll taxes as a prerequisite to voting in state and local elections.[1]

Thus, unlike the Fifteenth and Nineteenth Amendments which applied to *all* elections, the Twenty-fourth Amendment for the first time in our history created a possible distinction between qualifications for voting in Congressional elections and qualifications for voting in elections of members of the most numerous branch of the state legislature. In practical effect it created two sets of election laws in states having the poll tax as a prerequisite to voting where only one set existed before; this, as the Congress ex-

[1] H.R. Rep. No. 1821, 87th Cong. 2d Sess. 5 (1962) (filed as Def. Ex. 25); Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong. 2d Sess. Ser. 25, at 25 (1962) (filed as Def. Ex. 24); 108 Cong. Rec. 3846 (1962) (remarks of Senator Holland) (filed as Def. Ex. 14).

pressly recognized,[2] was certain to create many mechanical or administrative problems.

The General Assembly was called into extra session in 1963 to deal with these practical problems in a way which would comply with the new mandate of the Twenty-fourth Amendment to the Constitution of the United States and also the long established requirements of the Constitution of Virginia. A fair reading of Acts of the General Assembly of Virginia, Extra Session, 1963, compels the conclusion that their purpose and effect were simply to codify the impact of the Twenty-fourth Amendment upon the Constitution and laws of Virginia and provide the mechanics for administering one set of qualifications (excluding poll tax payment) for registration and voting in federal elections and another set (including poll tax payment) for registration and voting in state and local elections.

B. Qualifications for Voting Are Created By State Constitutions Subject to Restrictions of U. S. Constitution.

In the first sentence of its opinion (R. 43), the court below concluded that the Statutes Involved create a new or additional *qualification* for the federal voter not demanded of the state voter,[3] and thus are repugnant to Article 1, § 2 and the Seventeenth Amendment to the Constitution of the United States. This conclusion is the corner-

[2] E.g., 108 Cong. Rec. 3846 (1962) (remarks of Senator Hill); *id.* at 4161 (remarks of Senator Byrd) (filed as Def. Ex. 16).

[3] As used herein, "federal voter" refers to qualified electors of members of Congress as provided in Article I, § 2 and the Seventeenth Amendment to the Constitution of the United States, and "state voter" refers to qualified electors of the House of Delegates of the General Assembly, the most numerous branch of the General Assembly of Virginia as referred to in Article I, § 2 and the Seventeenth Amendment. This definition of terms is to be contrasted with that used by the court below (R. 43), which erroneously expanded these terms from Article I, § 2 and the Seventeenth Amendment to include electors of *all* federal and state officers.

stone of the entire opinion, and it is plainly and fundamentally erroneous.

The relevant provisions of Article I, § 2[4] upon which the court below relied are as follows:

> The House of Representatives shall be composed of Members chosen. . . . by the People of the several States, and the Electors in each State shall have the Qualifications requisite for the most numerous Branch of the State Legislature.

These provisions represent a compromise reached by the members of the Constitutional Convention of 1787. While they realized that the subject of qualifications of electors of the federal legislature was too important to be omitted entirely from the national organic law, the framers of the Constitution were also aware that any attempt to lay down national uniform qualifications would arouse powerful opposition from the states. Consequently, they adopted Article I, § 2 as a compromise intended to promote stability and uniformity as fully as possible by making the qualifications of the national and state popular electors the same within each state, and simultaneously to preclude state opposition by leaving to the people of each state the ultimate power to establish such qualifications. As Madison wrote in *The Federalist, No. 52*, at 342 (Modern Library ed.):

> It [Article I, § 2] must be satisfactory to every State, because it is conformable to the standard already established, or which may be established, by the State

[4] The Seventeenth Amendment, which deals with popular election of members of the Senate, is substantially identical to Article 1, § 2 insofar as elector qualifications are concerned, and the two constitutional provisions are therefore to be given the same construction in this respect. Cf. *United States* v. *Aczel*, 219 Fed. 917, 929 (D. Ind. 1915), aff'd, 232 Fed. 652 (7th Cir. 1916).

> itself. It will be safe to the United States, because, being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such manner as to abridge the rights secured to them by the federal Constitution.

It is plain that Article I, § 2 (and the Seventeenth Amendment when later enacted) contemplate that the people of the states must first establish in their state constitutions the qualifications for state voters, which qualifications are then adopted by the U. S. Constitution as qualifications for federal voters. This Court and numerous other authorities have repeatedly observed that it is the state law that fixes the qualifications that apply to both federal and state voters. *E.g., Minor* v. *Happersett,* 88 U. S. (21 Wall) 162, 171 (1875); *Ex parte Yarbrough,* 110 U. S. 651, 663 (1884); *Pope* v. *Williams,* 193 U. S. 621, 633 (1904); 1 *Story, Constitution,* § § 583-86 (4th ed. Cooley 1873); *Black, American Constitutional Law,* 535-37 (2d ed. 1897); see *Breedlove* v. *Suttles,* 302 U. S. 277 (1937); *Lassiter* v. *Northampton County Bd. of Elections,* 360 U. S. 45 (1959).

All the states now have, or have had, qualifications for voting based on age, residence, sex, race, property ownership, payment of taxes, literacy or other factors. But it should be observed at this point that the power to fix these qualifications, as vested in the people of the states by Article I, § 2 and the Seventeenth Amendment has subsequently been limited or restricted by the three Amendments dealing with voting qualifications—the Fifteenth, Nineteenth and Twenty-fourth. Each of these Amendments rendered inoperative a particular type of qualification (either in all elections or in specified federal elections), but none has altered fundamentally the original plan whereby the states

originate the voting qualifications, which are then adopted for federal voters to the extent provided in the Constitution of the United States.

As Madison foresaw, the state courts have been quick to proclaim the fundamental nature of voting qualifications. The Supreme Court of Appeals of Virginia, like similar courts in a majority of the states, has adopted the rule that qualifications for voting originate in the Constitution of Virginia and cannot be created or rescinded by mere legislative enactments. See *Carlisle* v. *Hassan*, 199 Va. 771, 102 S.E. 2d 273 (1958); *Willis* v. *Kalmbach*, 109 Va. 475, 64 S.E. 342 (1909); *Pearson* v. *Bd. of Supervisors*, 91 Va. 322, 21 S.E. 483 (1898).

C. The Statutes Involved Could Not and Did Not Create a New Qualification for Voting.

Every state has residence qualifications for registration and voting. Scammon, *The Electoral Process*, 27 *Law & Contemp. Prob.* 299 (1962). This has been a keystone of state control over voting. This Court has said that "residence requirements" are obvious examples indicating factors a State may take into account in determining the qualifications of voters. *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45, 51 (1959).

Sections 18 and 20 of the Constitution of Virginia impose residence qualifications upon both registration and voting. As was explained in the debates of the Virginia Constitutional Convention of 1901-2, "this provision as to residence was recommended in the Constitution in order that the voter may be thoroughly identified with the community and may have a common lot with the people of the State, by a fixed residence in the State for a definite period." 2 *Debates of Const. Conv. of 1901-2*, 2943.

The requirements for proof of residence for voting purposes have great practical significance because Virginia has the permanent registration system whereby a person once registered to vote is not required to reregister periodically as in many other states. The means used since 1902 to keep the permanent registration list up to date is the list of persons who have voluntarily paid the poll tax assessed against all Virginia residents, which list is compiled and published prior to every primary or general election and used at the polls to verify the continuing eligibility of voters appearing on the permanent registration list. See *Va. Const.* § 38. Thus, payment of the poll tax has been not only a constitutional qualification for registration and voting, but also a practical means of proving the continuing residence required of all voters.

To give effect to the Twenty-fourth Amendment in federal elections and simultaneously retain the old provisions of the Constitution of Virginia in state elections required the creation of a method, in addition to voluntary payment of the poll tax, of proving continuing residence. This alternative method was the filing by the voter of a simple certificate of continuing residence during the same period when poll taxes must be paid, so that lists of persons establishing residence by either method could be prepared and published prior to each election and then be used to check eligibility at the polls.

The alternative method of proof was couched in plain language indicating unmistakably that it was not intended to constitute a new or added qualification which would violate the Constitutions of the United States and of Virginia.

Contrary to the ruling of the court below, a requirement of proof like that contained in the Statutes Involved does not establish a voter "qualification" as a matter of state

law (and consequently of federal constitutional law), but merely establishes the means by which an existing qualification shall be proven.[5] The Statutes Involved purport to do no more than to require all voters—state and federal—to furnish each year subsequent to their registration proof that they have continued to satisfy the state and local residence requirements of Section 18 of the Constitution of Virginia, and it is universally held that a requirement of this type does not amount to a "qualification." See the cases collected in Annot., *Validity of statute requiring information as to age, sex, residence, etc., as condition of registration or right to vote*, 14 A.L.R. 260 (1921).

Two cases which the Appellants believe are particularly persuasive on this question are *Southerland* v. *Norris*, 74 Md. 326, 22 Atl. 137 (1891), and *Pope* v. *Williams*, 98 Md. 59, 56 Atl. 543 (1903), aff'd, 193 U. S. 621 (1904). These cases held that legislative enactments requiring certain persons to register their intent to become or remain residents well in advance of election day did not create qualifications in addition to those found in the state constitution, but merely established the means of *proving* residence.

In the *Southerland* case, the statute in question provided that any registered voter who had removed from the state would be conclusively presumed to have abandoned his voting residence in Maryland unless, within thirty days after the passage of the statute, he should make an affidavit

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[5]As a matter of historical interest, it is noteworthy that the first Constitution of Virginia, that of 1776, provided in Article VII that

> the right of suffrage in the election of members of both Houses shall remain as exercised at present. . . .

Among the several colonial election laws thus continued in effect was a law providing that a prospective voter might, before being admitted to vote, be compelled to make an oath that he possessed the local property ownership qualifications then required. 4 Laws of Virginia 476-77 (Hening 1820).

before the clerk of court that he did not intend to abandon his residence, but intended to return and resume his Maryland habitation prior to six months before election day. It was argued that the statute created a voter qualification in addition to those enumerated in the state constitution. The court, however, held that

> the section in question does not purport to, and does not in fact, add anything to the qualifications of age and residence as they are fixed in the constitution. It deals exclusively with the evidence by which one of those qualifications—that of residence—shall be proved, just as it might have done with regard to the proof of age. (22 Atl. at 138.)

The statute questioned in the *Pope* case provided that no person coming into the state would be allowed to register to vote until one year after his intent to become a resident should have been formally entered upon a record book to be kept by the county clerks. Once again, it was argued that the statute established an additional qualification, and once again the court rejected the argument. It declared, 56 Atl. at 544:

> Nor does the statute impose qualifications for voting, other than those prescribed by the Constitution. It leaves those qualifications precisely as they were before. It deals exclusively with the evidence necessary to establish residence, by providing what the evidence of residence shall be.

The Statutes Involved, exactly like the statutes in question in these two Maryland cases, merely provide alternative means by which voting residence in Virginia may be proved, and in so doing, they do not create any new or additional qualifications for the state or federal voter. The

means chosen by the General Assembly of Virginia are, of course, different from those employed by the Maryland legislature, but the instant cases are in principle indistinguishable from the Maryland cases. To require proof of residence is simply not to prescribe a new voter qualification for purposes of state law, and therefore for federal constitutional purposes as well.

The court below, however, attached controlling importance to the formal differences between the two means of proof permitted under the Statutes Involved. The Appellants cannot dispute the fact that purely formal differences exist, but insist that they are not sufficient to make filing a certificate of residence a new qualification for voting.

The sum of the reasoning of the court below on this point is that inasmuch as payment of a poll tax "does not entail a procedure which is trustworthy in vouching residence," and is characterized by "almost total deficiency as evidence of residence," its alternate, filing a certificate of residence, is inexplicable except as an "independent or superadded qualification" (R. 47). The Appellants believe that this reasoning is refuted both by the record in these cases and by the law generally.

In the first place, the finding that payment of state poll taxes does not effectively prove voting residence in Virginia is not only utterly devoid of support in the record; it is positively contradicted by it. The only evidence in the record as to the evidentiary significance of poll tax payment in Virginia consists of the legislative history of the Special Acts: Governor Harrison's address to the General Assembly of Virginia at its November, 1963 Extra Session (R. 71-82); the statement of the Attorney General of Virginia to the members of the Privileges and Elections Committees of the House of Delegates and Senate of the General As-

sembly at the Extra Session (R. 83-90); and the comment accompanying Section 24-17.2 of the bill introduced during the Extra Session (R. 97), which Section eventually became one of the Statutes Involved.

Governor Harrison reviewed the history of the Virginia election laws, and noted that poll tax payment has long served as a necessary concomitant of Virginia's system of permanent registration. He said:

> The architects of the Constitution, having determined upon permanent registration, and having abandoned the requirement of ownership of property as a qualification to vote, and then having failed to provide any effective literacy test, were confronted with the problem of how the electorate could be restricted to residents of this State,—and some stability attained.
>
> Obviously they could not use the real estate or personal property tax list, for ownership of property was not to be made a condition for voting, and for the further very practical reason that many residents of Virginia do not own real or personal property, but do possess the intelligence, interest, and the ability to exercise the right of franchise.
>
> It became apparent that the only list which should contain the name of every adult resident of Virginia was the capitation tax list. Accordingly, and out of the genius of that body of men, originated our present system, whereby it is presumed that any person, assessed with a capitation tax (and thereby alleged to be a resident of Virginia) who comes forward and voluntarily pays the assessment, six months prior to a general election, shall be presumed to be a resident of Virginia, and shall be deemed to have satisfied those provisions of the Constitution of this State which restrict voting to such residents.
>
> Again I remind you that the capitation tax is Virginia's only universal tax that is assessed on every

adult. It is a debt and is owed like all other taxes. It is paid by the citizens of this State in the same manner as a good citizen pays his other tax obligations. Because the tax is universal, the names and addresses of the persons against whom it is assesed are obtained by the Commissioners of Revenue from innumerable sources, and in some instances, the tax is assessed erroneously and inadvertantly on people who have moved from Virginia, people who are dead, and some who are nonexistent. Certainly the voluntary payment of this tax by a person is fairly conclusive proof of the correctness of the assessment, and confirmation by that person of the fact that he is still a resident of this State. (R. 76-77)

Similarly, the Attorney General stated:

. . . In Virginia, under our Constitution, there is only one registration which is permanent. Section 18 of the Constitution quoted above has always required residence of a specific time *next preceding an election* in which a person offers to vote. The assessment of the capitation or poll tax is made upon residents over twenty-one years of age as required by Section 173 of the Constitution. The bill is sent to a specific address. Payment admits continued residence. If a person is moving, he certainly would not pay this bill. Payment of the poll tax can therefore be accepted as admission of residence and of the intent to continue. Virginia has always acepted the payment of the poll tax as proof of continuing residence. . . . (R. 85)

And the comment on Section 24-17.2 reads:

This is a new section requiring voters registered under § § 24-67 or 24-67.1 to offer proof of residence in each year following the year of registration in conformity with Section 18 of the Constitution of Virginia. In the year of registration, the application for

registration will constitute sufficient proof of residence. Proof of residence may be furnished in person or otherwise by either of two prescribed methods, and no other way. Continuing residence may be annually established by (i) payment of the poll tax, *thus continuing this long established method*, or (ii) filing a certificate of residence. . . . (R. 97) (Emphasis added.)

Thus, the Appellants believe that the finding of the court below that payment of a poll tax does not effectively prove residence is both unsupported and contradicted by the record. It was incumbent upon the Appellees herein to prove that there is no reason in fact for equating poll tax payment with filing a certificate of residence, but they failed to carry their burden of proof—in fact they did not introduce a scintilla of evidence tending to rebut the legislative history of the Special Acts.

Moreover, in addition to being unsupported by the record, the view of the court below as to the evidentiary effect of poll tax payment is untenable even as an abstract statement of law. Payment of a poll tax, or other personal tax assessed in a certain place, is regularly mentioned in innumerable cases as one of the circumstances (if not the major one) to be considered on the question of legal residence or domicile. See, e.g., *Mitchell* v. *United States*, 88 U. S. (21 Wall.) 350, 353 (1875); 1 Beale, *Conflict of Laws*, § 41C.6 (1935). Thus, payment of a poll tax has been cited to prove legal residence or domicile for purposes of the right to vote and to hold office, *Dotson* v. *Commonwealth*, 192 Va. 565, 66 S.E. 2d 490 (1951); *Williams* v. *Commonwealth ex rel. Smith*, 116 Va. 272, 81 S.E. 61 (1914); *Clark* v. *Stubbs*, 131 S.W. 2d 663 (Tex. Civ. App. 1939); *Canfield* v. *Cravens*, 138 La. 283, 70 So. 226 (1915); *State ex rel. Egan* v. *Steele*, 33 La. Ann. 910 (1881); *Yonkey* v. *State*

ex rel. Cornelison, 27 Ind. 236 (1866); for purposes of divorce jurisdiction, *Ex parte Weissinger*, 247 Ala. 113, 22 So. 2d 510 (1945); *Warren* v. *Warren*, 73 Fla. 764, 75 So. 35 (1917); *Chase* v. *Chase*, 66 N. H. 588, 29 Atl. 553 (1891); and for purposes of tax liability, *Bowen* v. *Commonwealth*, 126 Va. 182, 101 S.E. 232 (1919); *Cooper's Adm'r* v. *Commonwealth*, 121 Va. 338, 93 S.E. 680 (1917).

In fact, the act of payment of the Virginia poll tax in conformity with the Statutes Involved inherently proves exactly that which a person filing a certificate of residence must certify; consequently the two means of proof are rationally interchangeable with one another, and the reasoning of the court below that the differences between them are substantive rather than formal, so as to make the certificate a qualification, is erroneous.

It is to be noted first that in Virginia, the poll tax is assessed only against state residents. See *Va. Const.* § 173, *Va. Code* § 58-49. It is assessed on the first day of January of each year. *Va. Code* § 58-4. The Statutes Involved specify that the taxes that are paid to prove voting residence are not the taxes for the current (election) year, but the taxes due for the three years *next preceding* the current year. Therefore, when a prospective voter proves his residence by payment of poll taxes as provided in the Statutes Involved, he thereby demonstrates not only that he is a resident at the time he pays, but that he has been an assessable resident at least since January first of the year next preceding the election year—and that the one year's Virginia residence requirement of *Va. Const.* § 18 is therefore satisfied.

Furthermore, state poll taxes are not paid directly to the State treasurer upon his assessment, but are assessed by and paid to the local commissioners of revenue of each

political subdivision in the state. See *Va. Const.* § 38; *Va. Code* § 58-864. The act of assessment itself requires a preliminary determination at the time of assessment by the local commissioner of revenue that the person assessed is a resident of his political subdivision, see *Va. Code* § 58-864, and this determination is followed by the preparation and mailing of a poll tax bill to the person at his local address. The determination made by the commissioner is substantiated when the person assessed pays the taxes locally. Thus, payment of poll taxes demonstrates not only that the person paying is a local resident when he pays the tax, but also that he has been a local resident at least since January first of the year next preceding the election year—and that the six months' local residence requirement of *Va. Const.* § 18 is therefore satisfied.

Continuing payment of state poll taxes accordingly does in fact show that the taxpayer's voting residence has continued uninterrupted since the date of his registration to vote. The act of payment is itself "affirmative proof" of the essential facts that must be certified in the residence certificate: state and local residence.

Since a voter in Virginia cannot be disfranchised by removal from one voting precinct to another, see *Va. Const.* § 18, it is not material that payment of a poll tax does not tend to indentify the taxpayer with any particular precinct within his locality, and correspondingly, although a voter who proves his residence by filing a certificate in accordance with the Statutes Involved must state his present residence address, he is not required to affirm that he will not remove from that address, but only that he will not remove from the locality. The requirement that the certificate be sworn to or witnessed merely endows it with probative value that might otherwise be argued to be utterly

lacking; in contradistinction to payment of a poll tax, which is universally accepted as proof of residence, see 1 Beale, *op. cit. supra,* § 41C.6, an unsworn declaration or claim of residence is regarded by many courts as so untrustworthy as to be inadmissible. See *id.* § § 41B-41B.1.

The form of the certificate of residence provided for in the Statutes Involved follows closely the forms of affidavits required of persons on active duty with the armed forces who are exempt from registration and payment of poll taxes as conditions of the right to vote. *Va. Const.,* Article XVII; *Va. Code* § § 24-23.1, 24-23.4.

It is interesting to note that the State of Massachusetts has had a law for many years which is comparable in several fundamental respects to the Statutes Involved. In Massachusetts, the registrars of each locality conduct annually a canvass to determine who are qualified voters. See *Mass. Gen. Laws Ann.,* ch. 51, § 4 (1959). Occasionally, a qualified voter will inadvertently be omitted from the list compiled in the canvass; but any male voter (Massachusetts assesses the poll tax only against males, *Mass. Gen. Laws Ann.* ch. 59, § 1 (1958)) so omitted may present a tax bill or notice or a certificate of residence, and either will be accepted as prima facie evidence of his residence. *Mass. Gen. Laws Ann.* ch. 51, § 43 (1958). The Statutes Involved are thus no legislative novelty; the Massachusetts statute demonstrates that in the judgment of one other state legislature, the mere *assessment* of a poll tax, not even its payment, is the substantive equivalent of a certificate of the voter as to his residence.

Therefore, in the Appellants' submission, the court below erred in ascribing to the formal differences between poll tax payment and filing a certificate of residence sufficient substance to make the certificate a qualification. It is merely one

of two permissively alternative means of proving a qualification—state and local residence—which everyone, including the lower court, concedes to be valid (R. 46).

What the court below has done is to strike down, for the flimsiest of reasons, a reasonable and legitimate requirement intended solely to prevent fraud and irregularity at the polls by supplying a rational alternative to the traditional means of proof of residence.[6] To be sure, the Statutes Involved do not absolutely guarantee that nonresidents will never vote in Virginia elections; while it is an unlikely possibility, a sufficiently determined person might abandon his residence after paying his poll taxes and then return to vote, just as he might file a perjured certificate. But the Appellants submit that the imperfection of the means of proof, or either of them, provided for in the Statutes Involved, is no reason for holding either one unconstitutional. It is unnecessary to cite cases to support the presumption of constitutionality which attends every legislative enactment and the correlative proposition that if such an enactment can be upheld, it must be. The Statutes Involved can and should be construed as doing nothing more than delineating one means by which *all* voters may evidence their residence qualifications in advance of election day, and as so construed, they do not create a separate qualification for any class of voters, and they must accordingly be held constitutional.

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[6] It should be emphasized that the Appellees stated in their opening brief in the court below that they were not raising questions as to possible racial discrimination, and the Special Acts clearly do not involve any such discrimination. The U. S. Commission on Civil Rights stated in its *1959 Report*, p. 118, that poll taxes no longer serve as a serious restriction on Negro voting. In its *1961 Report*, p. 22, the Commission found that "no significant racially motivated impediments to voting" exist in Virginia.

II

THE COURT BELOW ERRED IN APPLYING ARTICLE I, § 2 AND THE SEVENTEENTH AMENDMENT TO PRESIDENTIAL ELECTIONS.

The Appellants urge that it was manifestly improper for the court below to enter an order applicable to elections for President and Vice-President of the United States. There is no legal foundation in the opinion or the law generally for an order of this breadth.

If it is assumed that the certificate of residence is a qualification for the electors of Congress not required of electors of the Virginia House of Delegates, this would render it unconstitutional in *Congressional* elections for repugnancy to Article I, § 2 and the Seventeenth Amendment, just as the court below held. But Article I, § 2 and the Seventeenth Amendment do not extend beyond Congressional elections. There is nothing in the Constitution of the United States requiring that the qualifications of voters for the President and Vice-President be the same as the qualifications for voters for any other officer, federal or state. On the contrary, the Constitution provides solely that the President and Vice-President are to be elected by the Electoral College, see the Twelfth Amendment, whose members are appointed by each state, "in such Manner as the Legislature thereof may direct." Article II, § 1.

It is therefore clear that since the lower court's opinion was bottomed solely upon Article I, § 2 and the Seventeenth Amendment, the opinion must leave the certificate of residence operative for voters in Presidential elections. Consequently, even if the opinion of the court below had established a legal basis for an order enjoining the Appellants from requiring a certificate of residence of electors of the Congress, it provides no legal basis whatever for an order

similarly enjoining the Appellants from requiring the certificate from popular electors of the President and Vice-President.

III

THE COURT BELOW SHOULD HAVE APPLIED THE DOCTRINE OF ABSTENTION IN CASES INVOLVING VOTER QUALIFICATIONS UNDER THE CONSTITUTION OF VIRGINIA.

In view of the many decisions of this Court applying the doctrine of abstention, and in view of the unmistakable intent of the Constitution of the United States, it was clearly erroneous for the court below to overrule summarily the Appellants' motions for a stay of proceedings pending an interpretation of the Special Acts by the Virginia courts.

These cases were instituted immediately after the Special Acts went into effect and, of course, before there was any opportunity for construction by the Virginia courts. Compare *Albertson* v. *Millard,* 345 U. S. 242 (1953). If a Virginia court should find that the certificate of residence requirement of the Special Acts is an independent or superadded qualification in addition to those found in the Virginia Constitution, it would concededly hold the requirement invalid as a matter of state law, and a crucial federal constitutional issue would accordingly disappear from the case. See *Spector Motor Serv., Inc.* v. *McLaughlin,* 323 U. S. 101, 105 (1944).

It is difficult to conceive of a more important and valid concern of a state and its people than the orderly administration of elections and the prevention of fraud and irregularity at the polls. Compare *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S., 368, 383 (1949). The lower court's Final Order has worked a "disruption of an entire legislative scheme of regulation," *Hostetter* v. *Idlewild Bon Voyage Liquor*

Corp., 377 U. S. 324, 329 (1964), and it has done so needlessly, since the Virginia Declaratory Judgments Act provides an "expeditious avenue," *Harrison* v. *NAACP*, 360 U. S. 167, 178 (1959), by which the Appellees, with full protection of all their federal constitutional claims, could have presented the issues raised below to the proper Virginia tribunals, which are unquestionably far better equipped than the lower court to unravel the skeins of local law and administrative practices in which the Appellees' claims are entangled.

These cases are not in the least similar to *Davis* v. *Mann*, 377 U. S. 678 (1964), except that both involve elections and voting. The relevant state constitutional and statutory provisions were said in *Davis* to be "clear and unambiguous." Here the question of validity of the Statutes Involved under the *Virginia* Constitution is far from clear, as demonstrated by the fact that the Appellees devoted two-thirds of their opening brief in the court below to the argument of this pure question of state law. The court below chose to ignore the state question and to decide that the Statutes Involved are "qualifications" under the Constitution of the United States, although it is perfectly clear (and has been for over 150 years) that such Constitution does not *create* such qualifications but only *adopts* those created by the states in the exercise of a power limited at the federal level only by the Fifteenth, Nineteenth and Twenty-fourth Amendments.

Thus, it is apparent that there remains in these cases a threshold question of state law that is novel, difficult and still unanswered—but possibly dispositive of all the issues herein. All the "concerns which have traditionally counseled a federal court to stay its hand," *Martin* v. *Creasy*, 360 U. S. 219, 224 (1959), exist in these cases in a marked degree, and the lower court should therefore have abstained.

But in addition to the presence of the aforementioned concerns, there is another reason of constitutional dimensions, already discussed above, why the court below erred in refusing to abstain. According to the earliest great commentaries on the Constitution, to numerous decisions of this Court and to the plain wording of the provisions themselves, Article I, § 2 (and the identical language of the Seventeenth Amendment) of the Constitution of the United States establish the *exclusive* power of the states to create voter qualifications for electors of the Congress. To be sure, once voter qualifications are fixed by the states, they become, through adoption by the same federal constitutional provisions, part of the Constitution itself, see *Ex parte Yarbrough,* 110 U. S. 651, 663 (1884); and thus, once a voter is qualified under state law, his right to vote for members of the Congress becomes a federally protected right, see *United States* v. *Classic,* 313 U. S. 299, 314-15 (1941). But the preliminary process of fixing voter qualifications unquestionably is purely and wholly of a matter of state law: constitutional, statutory and decisional (if the question should arise whether or not a constitutional or statutory provision establishes a qualification). See *Ventre* v. *Ryder,* 176 Supp. 90, 97 (W. D. La. 1959).

Federal authority is likewise excluded by the Constitution of the United States from the matter of establishing the qualifications of voters for electors of the President and Vice-Preisdent, where such electors are chosen by popular vote. Article II, § 1 entrusts this matter wholly and exclusively to the states. See *e.g. McPherson* v. *Blacker,* 146 U. S. 1, 27 (1892); *In re Opinion of the Justices,* 118 Me. 552, 107 Atl. 705, 706 (1919); *McCrary, Elections,* § 38 (4th ed. 1897).

Thus, the Constitution of the United States by necessary

implication, gives exclusive competence to the state courts to decide the question whether a state legislative enactment creates a qualification or not, and the same Constitution must therefore effectively deprive the federal courts of competence to decide that question. It is quite plain that Article I, § 2, Article II, § 1 and the Seventeenth Amendment prevent Congress from enacting legislation to establish voter qualifications, and it is likewise plain by parity of reasoning that these same provisions must, when the issue is presented, prevent the federal courts from establishing qualifications, as the court below did, by judicial decree. And if these provisions do not absolutely prohibit the federal courts from deciding questions of voter qualifications, surely they indicate most forcefully that the state courts are the proper tribunals for the resolution of such questions.

Therefore, the court below erred in denying the Appellants' motions to stay, since all the traditional reasons compelling absention are present, and additionally because the Constitution of the United States requires that the very question decided by the court below be submitted to the courts of Virginia. Due respect for the powers of the people of the states in this area, which antedate the Constitution itself and which Article I, § 2, Article II, § 1 and the Seventeenth Amendment were intended to preserve intact, demands nothing less.

IV

THE COURT BELOW ERRED IN OVERRULING THE APPELLANTS' MOTIONS TO DISMISS.

The court below overruled the Appellants' motions to dismiss in both cases for failure to join indispensable parties, namely the registrars and other local election officials of

Roanoke and Fairfax Counties where the Appellees reside. Its reasoning was that since it could halt the certificates of residence at their source, as it did, by forbidding the State Board of Elections and the local revenue officials who had been joined from specifying the form of the certificates and from receiving them, all indispensable parties were before the court.

If the issue of indispensability were to be determined by the nature of the relief eventually *granted,* there could be no substantial question as to the propriety of the lower court's holding. But this is not the test; the test is rather whether an order granting the relief *requested* would require the party not joined to take action or refrain from taking it, or, to say the same thing, whether such an order can expend itself solely upon the persons before the court. See *Williams* v. *Fanning,* 332 U. S. 490, 493, 494 (1947); 2 *Barron & Holtzoff, Federal Practice & Procedure,* § 515 (1961).

The relief requested in the complaints in the instant cases was an injunction against enforcement of *all* of the Special Acts, not merely the portions thereof dealing with the certificate of residence (R. 4, 22). The relief requested accordingly included an injunction of registration under the dual system established by the Special Acts (*Va. Code* §§ 24-67, 24-67.1, R. 11-12). But registration in Virginia is entrusted to local registrars, see *Va. Code,* tit. 24, ch. 6, and the appellants have no power over local registrars except to "supervise and co-ordinate" their work so as to insure uniformity of practices and legality and purity in all elections. *Va. Code* § 24-25. Consequently, under the rule just stated, the local registrars, whose inaction is necessary for the relief requested, and who are not under the mandatory authority of the Appellants, are indispensable parties, and the

court below ought to have dismissed these cases for their nonjoinder.

The court below likewise erred in denying the Appellants' motion to dismiss the complaint of the Appellee Henderson. Since Henderson is a registered and qualified voter who admittedly paid his poll taxes in conformity with the Statutes Involved (R. 20) and thereby proved his residence, he could not have been denied his franchise under color of the Special Acts in any election held in 1964. Therefore, since Henderson was neither harmed nor threatened with immediate harm by the statutes he attacked, it is elementary that he lacked standing to call their constitutionality into question. *E. g., Poe* v. *Ullman*, 367 U. S. 497 (1961); *Alabama State Fed'n of Labor* v. *McAdory*, 325 U. S. 450 (1945); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288 (1936); *id.* at 346-48 (Brandeis, J., concurring); *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405 (1900); *Marye* v. *Parsons*, 114 U. S. 325 (1885).

The Appellants submit that the lower court erred in disregarding both of the aforementioned fundamental procedural principles. Surely no case is important enough to warrant that orderly processes of law be cavalierly ignored in a headlong rush to the merits.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and final judgment entered for the Appellants, or in the alternative, that the judgment of the court below with respect to the preliminary motions should be reversed and these cases remanded with directions to the court below to dismiss the complaints in both, or in the alternative, that the judgment of the court below should be vacated and these cases re-

manded with directions to the court below to retain jurisdiction and to afford the Appellees a reasonable opportunity to proceed in the courts of Virginia, or in the alternative, that the Final Order of the court below should be modified so as to omit all reference to elections for President or Vice-President.

Respectfully submitted,

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PROOF OF SERVICE

I, Richard N. Harris, one of the attorneys for the Appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of December, 1964, I served copies of the foregoing Brief for the Appellants on the several Appellees hereto by mailing same in duly addressed envelopes, with first-class postage prepaid to their respective attorneys of record as follows: H. E. Widener, Jr., Esq., Widener & Widener, Attorneys at Law, Reynolds Arcade Building, Bristol, Virginia; David H. Frackelton, Esq., Attorney at Law, Reynolds

Arcade Building, Bristol, Virginia; L. S. Parsons, Jr., Esq., Parsons & Powers, Attorneys at Law, Maritime Tower, Norfolk, Virginia; J. L. Dillow, Esq., Dillow & Andrews, Attorneys at Law, Giles Professional Building, Pearisburg, Virginia; John N. Dalton, Esq., Dalton, Poff & Turk, Attorneys at Law, First & Merchants National Bank Building, Radford, Virginia; and to Bentley Hite, Esq., Attorney at Law, First National Bank Building, Christiansburg, Virginia. Copies thereof were also mailed, in duly addressed envelopes, with first-class postage prepaid to: Ralph G. Louk, Esq., Commonwealth's Attorney for Fairfax County, Fairfax, Virginia, counsel of record below for the defendant, L. M. Coyner, and to Edward H. Richardson, Esq., Commonwealth's Attorney for Roanoke County, Roanoke, Virginia, counsel of record below for the defendant, James E. Peters.

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